Supreme Court, U.S.
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No. 93-590

In the Supreme Court of the United States

OCTOBER TERM, 1993

PHYLLIS SCHMIDT AND EARL SCHMIDT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
BARBARA C. BIDDLE
WILLIAM G. COLE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether Fed. R. Civ. P. 6(e) extends the statute of limitations for filing an FTCA action by three days.

2. Whether the procedures followed by the FAA in sending a letter denying petitioners' administrative claim constituted a certified mailing within the meaning of 28 U.S.C. 2401(b).

3. Whether equitable tolling excuses the late filing of a complaint where the complainants allege that their adversary dated a letter one day before mailing it.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A5-A6) is unpublished, but the decision is noted at 994 F.2d 843 (Table). The decision of the district court (Pet. App. A1-A4) is also unreported and was delivered orally.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1993. A petition for rehearing was denied on July 19, 1993. Pet. App. A7. The petition for a writ of certiorari was filed on October 13, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Phyllis Schmidt, a flight attendant, was injured in 1983 when the Ozark Airline plane on which she was flying struck a snow removal vehicle after landing in Sioux Falls, South Dakota. Mrs. Schmidt and her husband, petitioner Earl Schmidt, filed a claim for damages with the Federal Aviation Administration on November 1, 1985. In their claim, petitioners alleged that the air traffic controllers in Sioux Falls were negligent in failing to instruct the driver of the snow blower to leave the runway before granting the Ozark flight clearance to land. Pet. App. A17-A18.

The FAA denied petitioners' claim in a letter dated Wednesday, November 19, 1986. Petitioners' attorney signed the receipt for the letter five days later, on Monday, November 24. The letter notified petitioners that if they were dissatisfied with the FAA's determination, they could "initiate action in an appropriate United States District Court, * * * not later than six months after the date of mailing of this notification." Pet. App. A2. Petitioners filed their complaint in federal district court, alleging jurisdiction under the Federal Tort Claims Act, on Tuesday, May 21, 1987. Pet. App. A14, A18.

2. The government moved to dismiss petitioners' complaint for lack of subject matter jurisdiction, arguing that it was untimely filed under 28 U.S.C. 2401(b). Section 2401(b) provides that an action against the United States under the FTCA must be commenced "within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." In their opposition to the government's

motion, petitioners argued that the letter from the FAA had been mailed to petitioners' attorney on Friday, November 21, 1986, and that the complaint had been timely filed exactly six months later. Pet. App. A18.

The government's motion to dismiss was referred to a magistrate. The magistrate recommended to the district court that the government's motion be denied since the date of mailing of the letter from the FAA was uncertain. The district court, however, upheld the government's objection to the magistrate's recommendation and granted the government's motion to dismiss for lack of subject matter jurisdiction. The district court found that the FAA employed a private mail service, DDD Company, to pick up its mail, sort it, and deliver it to the post office. Pet. App. A14. The court noted that the log books of DDD indicated that the denial letter had been picked up on November 20, 1986, and that it had a green receipt card attached. *Ibid.* The receipt indicated that the letter was to be sent by certified mail. *Ibid.* The district court held that, while the mailing date was not certain (*id.* at A15), the petitioners had the burden of "establishing the jurisdictional facts" and had failed to carry that burden. *Ibid.*

3. The court of appeals affirmed. Pet. App. A17-A21. Based on its review of the evidence presented in the hearing on the motion to dismiss, the court held that the Postal Service "most likely did receive the denial letter on November 20, 1986." *Id.* at A20. The court considered that petitioners "bore the burden of establishing subject matter jurisdiction once the Government challenged it" and concluded that "the evidence fails to establish [petitioners'] contention

that the denial letter was not mailed until November 21, 19[86]." *Ibid.*

The court of appeals also rejected petitioners' claim that, in not obtaining a dated receipt of mailing from the Postal Service, the FAA had failed to comply with the statutory requirement that denial letters be sent by certified mail. Pet. App. A20-A21.[1] The court explained that Postal Service regulations defining certified mail do not require a dated receipt of mailing and that customers sending large quantities of certified mail are allowed to use logbooks, in which they record the number and date of each mailing, as their receipts. *Id.* at A21; see United States Postal Service, Domestic Mail Manual § 912.45, at 486 (1987). Since DDD followed these procedures in mailing the letter denying petitioners' claim, the court held that the mailing was by certified mail and thus commenced the running of Section 2401(b)'s period of limitations. Pet. App. A21.

4. Following the court of appeals' decision, this Court decided *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), finding a statute of limitations in a suit against the government to be subject to equitable tolling. 498 U.S. at 95-96. On February 19, 1991, about two months after the *Irwin* decision, this Court granted a petition for certiorari filed by petitioners, vacated the court of appeals' judgment, and remanded this case "for further consideration in light of *Irwin*." Pet. App. A11.

On remand, the court of appeals held that a corollary to *Irwin*'s express holding allowing equitable

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[1] There has been no dispute that the FAA received a signed receipt reflecting petitioners' attorney's acceptance of the letter. Pet. App. A15.

tolling is the implied ruling that strict compliance with a statutory filing period is not a jurisdictional prerequisite to suit. Pet. App. A9. Since the court of appeals had premised its first decision on the assumed jurisdictional nature of the FTCA's statute of limitations, it remanded the case to the district court to determine when the denial letter had been mailed. *Id.* at A10. The court of appeals explained that because of this Court's *Irwin* holding, the district court should consider failure to comply with the FTCA statutory time limit as an affirmative defense which the government had the burden of establishing. *Ibid.*

5. The district court heard evidence concerning the mailing of the denial letter and determined that the government had met its burden of proof. The court held that the certified letter sent by the FAA to petitioners' counsel had been "collected by the United States Postal Service on November 20, 1986" and had been mailed on that day. Pet. App. A3. Since petitioners filed their action on May 21, 1987 (Pet. 4; Pet. App. A13), one day more than six months later, and since there were no grounds for equitably tolling the six-month time limit on filing an FTCA action, the district court again dismissed the petitioners' action. In an unpublished per curiam order, the court of appeals affirmed, holding that the findings of fact were not clearly erroneous and that there was no error of law. Pet. App. A6.

ARGUMENT

1. Petitioners contend that, even if the denial letter was mailed to their counsel on November 20, 1986, their filing of an action one day after six months had expired, on May 21, 1987, was within the six-month limitations period set by the FTCA in 28 U.S.C.

2401(b). Pet. 12-21. The issue of the proper method of calculating the six-month limitations period was never presented to the district court, and the court of appeals held that the issue was consequently not before it. Pet. App. A6 n.2. This Court ordinarily does not consider issues not properly raised below. *Helvering* v. *Wood*, 309 U.S. 344, 349 (1940). Even if the issue were properly raised at this time, however, it does not warrant a grant of certiorari.

Petitioners' argument that the six-month statutory period did not expire on May 20, 1987, is based in part on their view that Fed. R. Civ. P. 6(e) applies to the time limits set by 28 U.S.C. 2401(b). Pet. 16-18. If this were so, three days would be added to the prescribed period and their complaint would have been timely filed. While petitioners suggest that some differences have arisen among the federal courts concerning the methods by which statutory time periods should be computed (Pet. 13-14), they cite no conflict among the courts of appeals on the issue of whether Rule 6(e) is applicable to the time period set by 28 U.S.C. 2401(b) or, indeed, to any statute of limitations. Only one case has squarely addressed that question and has found Rule 6(e) inapplicable. *Carr* v. *Veterans Administration*, 522 F.2d 1355 (5th Cir. 1975).[2] In the absence of any conflict on this question, further review is not warranted.

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[2] While petitioners cite cases holding that Rule 6(a) may be applied to federal statutes of limitations (Pet. 20), these cases do not conflict with *Carr* because the language and purpose of Rules 6(a) and 6(e) differ substantially. The reason for not using Rule 6(e) in making Section 2401(b) calculations is based on the purpose of Rule 6(e) and the wording of Section 2401(b). The Fifth Circuit in *Carr* correctly noted that while the prescribed period of limitations under Section 2401(b) begins

2. Petitioners also suggest that the letter denying their administrative claim was not sent by "certified mail" within the meaning of 28 U.S.C. 2401(b), since the FAA did not obtain an individual receipt of mailing showing the date that the letter was received by the Postal Service. Pet. 21-27. As petitioners note, the United States Postal Service Regulations define certified mail as "a service that provides a mailing receipt to the sender and a record of delivery at the office of address." 39 C.F.R. Pt. 3001, Subpt. C, App. A, Classification Sched. SS-5, § 5.010. The procedures used by the FAA in sending its denial letter to petitioners complied with those standards. The agency attached a "green Certified Mail Return Receipt Card" that "indicated that the letter was to be sent by certified mail" and which was later "signed by [petitioners'] attorney when the letter was delivered." Pet. App. A3, A14-A15. That receipt provided "a record of delivery at the office of address." See 39 C.F.R. Pt. 3001, Subpt. C, App. A, Classification Sched. SS-5, § 5.010. As the court of appeals noted in its first decision (Pet. App. A21), an individual receipt of mailing is not required for certified mail. When three or more letters are mailed at one time, the Domestic Mail Manual allows senders to use a "mailing book" furnished by the Post Office

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with the "date of *mailing*," Rule 6(e) applies only when the prescribed period begins with the "*service* of a notice or other paper." 522 F.2d at 1357 (emphases added). As the court in *Carr* explained, the purpose of Rule 6(e) is "to equalize the time for action available to parties served by mail with that afforded those served in person." *Ibid.* That concern is irrelevant in Section 2401(b) calculations "where the period during which notice must be provided commences in the same way for all claimants." *Ibid.*

(Postal Service Form 3877) to create the requisite receipt of mailing. See United States Postal Service, Domestic Mail Manual § 912.45, at 486 (1987).[3] DDD followed this procedure, and the entry in DDD's logbook for the denial letter constituted a mailing receipt for purposes of the Postal Service's definition of certified mail. The procedures used to send the FAA's denial letter accordingly satisfied the Postal Service's definition of "certified mail."

Petitioners provide no support for their contention (Pet. 24) that Section 2401(b) should be construed to require a mailing receipt showing the date that an article was received by the Postal Service. Nothing in the Postal Service's definition of "certified mail" supports such a requirement. To the contrary, postal regulations regarding certified mail provide that a receipt showing the date of mailing is optional:

> *If requested by the mailer*, the time of acceptance by the Postal Service will be indicated on the receipt.

39 C.F.R. Pt. 3001, Subpt. C, App. A, Classification Sched. SS-5, § 5.021 (emphasis added).[4]

As petitioners concede, their contention raises an issue "of first impression" on which there is no conflict among the courts of appeals. Pet. 21. Moreover, the decisions on which petitioners rely are inapposite. In *Lindemood* v. *Commissioner of Internal Rev-*

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[3] The Postal Service has incorporated the Domestic Mail Manual by reference in its regulations. See 39 C.F.R. 111.1.

[4] See also United States Postal Service, Domestic Mail Manual § 912.44*d*, at 486 (procedures to be followed if the sender desires a postmarked mailing receipt); *id.* § 912.44*e*, at 486 (procedures to be followed if a postmarked receipt is not desired).

enue, 566 F.2d 646 (1977), the Ninth Circuit had no occasion to address the definition of certified mail. Rather, the court applied a statute, 26 U.S.C. 7502, and detailed Treasury Department regulations regarding proof of the date of filing of petitions for redeterminations of tax deficiencies with the Tax Court. 566 F.2d at 647-649. Those regulations and that statute have no bearing on this case. In *Johnson* v. *United States*, 652 F. Supp. 407 (E.D. Va. 1987), the government sent a denial letter by first-class mail without attempting to use registered or certified mail and thus clearly failed to meet the requirements of 28 U.S.C. 2401(b). Lastly, in *Miller v. United States*, 741 F.2d 148, 150 (7th Cir. 1984), the court concluded that the letter sent by the agency was not a final denial of the plaintiff's claim.

3. Finally, petitioners argue that their failure to file a timely action should be excused under equitable tolling principles. Petitioners argue that "the FAA induced and tricked [petitioners] into believing that the Statute of Limitations had run on May 19, 1987." Pet. 27. Petitioners apparently rely on this Court's statement in *Irwin* that equitable tolling is appropriate "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." 498 U.S. at 96. But even if the FAA had deliberately dated its letter one day before the letter was mailed, that would, at worst, have induced petitioners to file *before*, not after, the filing deadline, and thus would not have led to petitioners' allowing the filing deadline to pass.

Petitioners allege that they examined the FAA letter exactly six months after it was mailed, on May 20, 1987. Pet. 29. Seeing the November 19, 1986, date, they assumed that they were already untimely,

"[g]iven the Eighth Circuit's interpretation of 2401(b) at that time." *Ibid.* As a result, they suggest that they made no effort to rush the obviously untimely complaint to the district court, when they might otherwise have "faxed the complaint to Omaha" or "flown it themselves to Omaha." *Ibid.* Even assuming the truth of these facts, petitioners have produced no evidence that the FAA's dating of the letter was "misconduct," that petitioners were "tricked" within the meaning of *Irwin*, or that the FAA should be deemed responsible for their failure to file their complaint as soon as possible after discovering that it was apparently untimely.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA C. BIDDLE
WILLIAM G. COLE
Attorneys

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